

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Virtual Hipster Petition for Preemption of)
Jurisdiction of the Public Utilities)
Commission of Nevada Pursuant to Section)
252(e)(5) of the Communications Act of 1934,)
as amended)

CC Docket No. 00-247

FILED

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 2001

Released: March 1, 2001

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. This *Memorandum Opinion and Order* addresses the petition of Virtual Hipster Corporation (Virtual Hipster) for preemption of jurisdiction of the Public Utilities Commission of Nevada (Nevada Commission) with respect to the arbitration of an interconnection agreement with Churchill County Telephone and Telegraph d/b/a CC Communications (CCC).¹ Specifically, Virtual Hipster seeks preemption of the jurisdiction of the Nevada Commission pursuant to section 252(e)(5) of the Communications Act of 1934, as amended (the Act).² For the reasons set forth below, we deny Virtual Hipster's petition.

2. Section 252 of the Act sets forth the procedures by which telecommunications carriers may request and obtain interconnection, services, or unbundled network elements from an incumbent local exchange carrier.³ Section 252(b) permits a party negotiating an interconnection agreement to petition the relevant state commission to arbitrate any open issues.⁴ Section

¹ Petition of Virtual Hipster Corporation Pursuant to Section 252(e)(5) of the Communications Act, CC Docket No. 00-247 (filed Dec. 1, 2000) (Petition); see *Pleading Cycle Established for Comments on Virtual Hipster Petition for Preemption of Jurisdiction of the Public Utilities Commission of Nevada Pursuant to 47 U.S.C. § 252(e)(5)*, CC Docket No. 00-247, Public Notice, DA 00-2809 (rel. Dec. 12, 2000) (*Public Notice*).

² 47 U.S.C. § 252(e)(5).

³ See generally 47 U.S.C. § 252.

⁴ 47 U.S.C. § 252(b). The Act defines a state commission as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 3(41).

252(e)(5) requires the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which the state commission “fails to act to carry out its responsibility” under section 252.⁵

3. On October 5, 2000, Virtual Hipster filed with the Nevada Commission a petition pursuant to section 252(b) for arbitration of an interconnection agreement between Virtual Hipster and CCC, which is an incumbent local exchange carrier (LEC). On November 9, 2000, the Nevada Commission issued an order denying the petition for arbitration due to lack of jurisdiction over CCC, which is a county-owned telephone company.⁶ Nevada state law provides that control, management and conduct of any telephone line or system purchased, acquired or constructed by any county shall be exercised by the board of county commissioners of such county.⁷ According to the Nevada Commission, it lacks jurisdiction over CCC’s rates or terms and conditions of service, and any interconnection agreement would necessarily involve a determination of rates, terms and conditions. Virtual Hipster requests that this Commission preempt the jurisdiction of the Nevada Commission for failure to act to carry out its responsibilities pursuant to section 252(e)(5) and in accordance with the Commission’s implementing rules.⁸

4. The Commission placed the Virtual Hipster petition for arbitration on public notice December 12, 2000. Both CCC and the Board of County Commissioners of Churchill County, Nevada (the “Board”) filed comments on December 29, 2000, claiming that pursuant to Nevada state law, the Board and not the Nevada Commission, has jurisdiction over an arbitration involving CCC. The parties claim that the Nevada law gives the Board regulatory power over the terms and conditions of an interconnection agreement with CCC because any interconnection agreement would necessarily involve rates. Additionally, CCC states that this preemption petition is procedurally defective because the underlying petition for arbitration was not filed in a timely manner with the Nevada Commission. Virtual Hipster filed reply comments January 9, 2001, arguing that Nevada law does not give regulatory authority to the Board over telecommunications carriers other than CCC; the original arbitration petition was filed in a timely manner; and if the Commission does not assume jurisdiction, no other process exists to permit competitive entry in Churchill County.

II. DISCUSSION

5. We conclude that Virtual Hipster does not provide grounds for preemption under section 252(e)(5) or our implementing rules. Section 252 establishes a scheme whereby

⁵ 47 U.S.C. § 252(e)(5).

⁶ *In re Petition of Virtual Hipster Corporation for Arbitration to Establish all Components of an Interconnection Agreement with Churchill County Telephone Company d/b/a CC Communications, Inc., or Alternatively, an Order Declining Request Based on Jurisdictional Uncertainty*, Docket No. 00-10009, Order (Nov. 2000) (*Nevada Commission Order*).

⁷ 58 N.R.S. § 710.140.

⁸ 47 C.F.R. §§ 51.801, 51.803.

telecommunications carriers may obtain interconnection with an incumbent LEC according to agreements fashioned through (1) voluntary negotiations between the carriers, (2) mediation by state commissions, and (3) arbitration by state commissions.⁹ A “state commission” is defined by section 3(41) of the Act as: “the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.”¹⁰ Section 252(e)(5) directs the Commission to assume responsibility for any proceeding or matter in which the state commission “fails to act to carry out its responsibility” under section 252.¹¹

6. In this case, the interpretation of the Nevada state law providing responsibility to a commission, board, or official is at issue. The Nevada Commission’s holding denies jurisdiction over the interconnection arbitration based on the Nevada law, and the county Board claims to have jurisdiction. If Virtual Hipster does not agree with the interpretation of the state law granting authority over such matters to the Board, Virtual Hipster should seek judicial review of the Nevada Commission’s Order. Additionally, the Commission stated in the *Local Competition Order* that it would not take an “expansive view” of what constitutes a state commission’s failure to act, instead opting to preempt a state commission’s jurisdiction for failure to act under section 252(e)(5) only in those instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C).¹²

7. The Commission has since stated that, in reviewing a request for preemption under section 252(e)(5), it evaluates whether a state commission has fulfilled its responsibility under section 252 based on the particulars of each case.¹³ For example, in the “unique circumstances”

⁹ See 47 U.S.C. §§ 252(a)-(b).

¹⁰ 47 U.S.C. § 3(41).

¹¹ Section 252(e)(5) states: “COMMISSION TO ACT IF STATE WILL NOT ACT -- If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission’s jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.” 47 U.S.C. § 252(e)(5).

¹² See 47 C.F.R. § 51.801(b); *In The Matter of Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.’s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, with BellSouth before the Georgia Public Service Commission, and with GTE South Before the Public Service Commission of South Carolina*, CC Docket Nos. 97-163, 97-164, 97-165, Memorandum Opinion and Order, 13 FCC Rcd 1755, 1758-59, para. 33 (1997), *recons. denied*, 14 FCC Rcd 7024 (1999) (*Low Tech Order*) (noting that “a state commission does not ‘fail to act’ when it dismisses or denies an arbitration petition on the ground that it is procedurally defective, the petitioner lacks standing to arbitrate, or the state commission lacks jurisdiction over the proceeding”); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, 11 FCC Rcd 15499, 16128, para. 1285 (1996) (*Local Competition Order*).

¹³ *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd 11277, para. 8 (2000) (*Starpower Preemption Order*).

presented in *Starpower*, the Commission preempted the Virginia State Corporation Commission (Virginia Commission) for failing to act to enforce reciprocal compensation provisions in interconnection agreements where the Virginia Commission was uncertain of the eventual outcome of the Commission's proceeding governing intercarrier compensation for ISP-bound traffic.¹⁴ Likewise, in a recent case, the Commission preempted the Virginia Commission for expressly refusing to carry out its responsibility to arbitrate an interconnection agreement after several federal appeals courts had limited sovereign immunity claims of state commissions applying federal laws.¹⁵

8. The question presented here differs significantly from those presented in the *Starpower* and *WorldCom* cases. *Starpower* did not involve mediation or arbitration of an interconnection agreement and was based on the unique rulemaking and litigation circumstances surrounding reciprocal compensation. The *WorldCom* case involved a decision by an entity that clearly was the appropriate "state commission" under the Act. The instant case is not one in which the appropriate state commission failed to apply the Act, but instead one where the state commission and petitioner dispute the interpretation of state law as to whether the county Board or the Nevada Commission has jurisdiction. The Nevada Commission decision refers to its staff recommendation that the Nevada Commission had no jurisdiction over CCC and therefore had no jurisdiction to arbitrate an interconnection agreement to which CCC would be bound. Furthermore, the staff recommendation points to the Churchill County Board as having exclusive jurisdiction over the terms and conditions of service or rates provided by CCC. Significantly, the Board agrees that pursuant to Nevada law, it does have jurisdiction and is willing to arbitrate the interconnection agreement.¹⁶

9. We conclude that Virtual Hipster has not met its burden of proof that the Nevada Commission "failed to act" within the meaning of section 252(e)(5), but our conclusion does not leave Virtual Hipster without options. The Nevada Commission has acted by issuing a decision stating that it lacks jurisdiction over CCC, including lack of jurisdiction over CCC's rates or terms and conditions of service. In other words, the Nevada Commission denied Virtual Hipster's request for arbitration because it believed that it lacked jurisdiction over one of the parties to the arbitration. The Nevada Commission issued this decision at the express request of Virtual Hipster, despite the fact that CCC had consented to the Nevada Commission's ability to arbitrate an interconnection agreement between CCC and Virtual Hipster.¹⁷ The Bureau recognizes that CCC has in the past submitted itself to the jurisdiction of the Nevada

¹⁴ *Id.* at n.7 and para. 7.

¹⁵ See *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, CC Docket No. 00-218, Memorandum Opinion and Order, FCC 01-20 at para. 4 (rel. Jan. 19, 2001) (*WorldCom Preemption Order*).

¹⁶ *Office of Churchill County Commissioners Comments* at 1, citing 58 NRS § 710.140: "The control, management and conduct of any telephone line or system so purchased, acquired or constructed by any county shall be exercised by the board of county commissioners of such county."

¹⁷ *Nevada Commission Order* at paras. 4-5.

Commission.¹⁸ Additionally, we recognize that the statutory definition of "State commission" under the Communications Act refers to the "commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers."¹⁹ Thus, the Bureau understands how confusion may arise regarding the proper entity under state law to arbitrate an interconnection agreement between an incumbent LEC that is owned and regulated by a single county, and a competitive carrier that is subject to regulation statewide. However, the Nevada Commission has not failed to act within the meaning of section 252(e)(5) where it indicates that another entity within the state might be the appropriate "State commission" to arbitrate an interconnection agreement. To the extent that Virtual Hipster questions the Nevada Commission's interpretation of Nevada law in connection with the section 252 responsibilities of a state commission, the petitioner may seek court review. Additionally, we note that Virtual Hipster has not even availed itself of the opportunity to request arbitration by the Churchill County Board.

10. CCC also argues that Virtual Hipster's petition to the Nevada Commission for arbitration was defective because it was not filed within the 135 to 160 day timeframe provided by section 252. Because we conclude that Virtual Hipster has not met its substantive burden of demonstrating that the Nevada Commission has failed to act within the meaning of section 252(e)(5), we do not need to address CCC's additional argument that Virtual Hipster's original arbitration petition was procedurally defective.

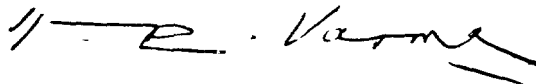
III. CONCLUSION

11. For the foregoing reasons, we deny Virtual Hipster's petition for the Commission to assume jurisdiction over an interconnection arbitration between Virtual Hipster and CCC in Nevada.

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, 47 U.S.C. § 252 and sections 0.91, 0.291, 51.801(a), 51.803 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 51.801(a) and 51.803, the petition for preemption of jurisdiction of the Public Utilities Commission of Nevada filed by Virtual Hipster Corporation on December 1, 2000, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



for Dorothy T. Attwood
Chief, Common Carrier Bureau

¹⁸ *Comments of Churchill County Telephone and Telegraph d/b/a CC Communications at 5.*

¹⁹ 47 U.S.C. § 3(41).